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No. 92-1482

In the Supreme Court of the United States

OCTOBER TERM, 1992

ERIC J. WEISS AND ERNESTO HERNANDEZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THEODORE G. HESS
Colonel, USMC
LAWRENCE W. MUSCHAMP
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Appellate Government Division,
NAMARA
Washington, D.C. 20374-1111

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QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military to serve as court-martial trial judges and judges of the courts of military review.

2. Whether due process requires that military judges have a fixed term of office.

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OPINIONS BELOW

The opinion of the Court of Military Appeals in the case of petitioner Weiss, Pet. App. 1a-85a, is reported at 36 M.J. 224. The opinion of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 86a-87a, is unreported. The order of the Court of Military Appeals in the case of petitioner Hernandez, Pet. App. 88a, is not yet reported. The order of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 89a-91a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals in *United States* v. *Weiss* was entered on December 21,

1992. The judgment of the Court of Military Appeals in *United States* v. *Hernandez* was entered on February 25, 1993. The petition for a writ of certiorari in both cases was filed as a joint petition on March 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner Weiss, a member of the United States Marine Corps, was convicted at a special court-martial of one count of larceny, in violation of Article 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 921. He was sentenced to three months' confinement, to partial forfeitures of pay for three months, and to a bad-conduct discharge. Petitioner Hernandez, also a member of the Marine Corps, pleaded guilty to two counts of possession, two counts of introduction, one count of exporting, and one count of distributing cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. 912a, and to one count of conspiring to commit those offenses. He was sentenced to 25 years' confinement, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank. The convening authority approved Hernandez's sentence as adjudged, but suspended all confinement in excess of 20 years in accordance with the pretrial agreement.

Petitioners did not raise the questions presented in the Navy-Marine Corps Court of Military Review, which affirmed petitioners' convictions. Pet. App. 86a-87a, 89a-91a. Petitioners raised those claims before the Court of Military Appeals. In the case of petitioner Weiss, the Court of Military Appeals granted plenary review to address his claims and affirmed. *Id.* at 1a-85a.

Relying on its earlier decision in *United States* v. *Graf*, 35 M.J. 450 (C.M.A. 1992), petition for cert. pending, No. 92-1102, the court, without dissent, held that due process does not require military judges to have a fixed

term of office. Pet. App. 2a n.1. The court also rejected petitioners' Appointments Clause challenge to the judges on the trial courts and courts of military review. *Id.* at 3a-35a. Two judges concluded that an officer's assumption of duties as a military judge does not create a new "office" requiring a new appointment for each such judge, and that, in any event, the duties of any such office are germane to the duties that military officers already discharge. *Id.* at 8a-19a. Judge Crawford concurred in the result on the ground that the Appointments Clause does not apply to the military. *Id.* at 22a-35a. Chief Judge Sullivan and Judge Wiss dissented. *Id.* at 36a-85a.

In the case of petitioner Hernandez, the Court of Military Appeals summarily affirmed on the basis of its decision in *United States* v. *Weiss*. Pet. App. 88a.

ARGUMENT

1. Petitioners maintain that the military trial judge and appellate judges in their cases were not qualified to hold those positions because they were appointed to them by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court.

a. There is no conflict among the circuits on the question presented by the petition. Only two appellate courts other than the court below have spoken on this subject; both courts are intermediate appellate courts in the military justice system; and both courts rejected an Appointments Clause challenge to the composition of the courts of military review. See *United States* v. *Coffman*, 35 M.J. 591 (N.-M.C.M.R. 1992); *United States* v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992). No federal appellate court has ruled to the contrary.

b. Petitioners' claim lacks merit. The Appointments Clause does not bar Congress from authorizing the Judge Advocate General to select commissioned officers

in the military to serve as court-martial trial judges and judges of the courts of military review.

i. The Appointments Clause, Art. II, § 2, Cl. 2, provides that only the President (with the advice and consent of the Senate) may appoint "Officers of the United States."[1] By contrast, Congress can vest the power to appoint "inferior Officers" "in the President alone, in the Courts of Law, or in the Heads of Departments." In petitioners' view, military judges are "inferior Officers," but the Judge Advocates General are neither "Courts of Law" nor "the Heads of Departments" and therefore cannot appoint military judges. The short answer to petitioners' argument is that because the trial and appellate judges in their cases were officers of the United States appointed by the President and confirmed by the Senate, an additional appointment pursuant to the Appointments Clause is unnecessary.

Military trial judges are part of a comprehensive system of military justice established by the Uniform Code of Military Justice. The Judge Advocates General of the services are primarily responsible for implement-

[1] The Appointments Clause provides as follows:

> He [the President] * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

ing the UCMJ.[2] In carrying out that obligation, the Judge Advocates General detail commissioned military officers to serve at almost every level of the military justice system.[3] Consistent with that scheme, Article 26(b) of the UCMJ, 10 U.S.C. 826(b), provides as follows:

> A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal Court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

The trial judges in petitioners' cases were commissioned officers. Furthermore, each commissioned officer in the Navy and Marine Corps is appointed, at least originally, by the President with the advice and consent of the Senate.[4] As a commissioned officer, a military trial

[2] The Judge Advocates General are defined as "the Judge Advocates General of the Army, Navy, and Air Force and except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation." 10 U.S.C. 801(1).

[3] See, *e.g.*, 10 U.S.C. 801(13) (specifying that all "judge advocate[s]" must be military "officer[s]" serving in the various Judge Advocate General corps or other military "officer[s]" designated as "judge advocate[s]" or "law specialist[s]"), 826 (requiring the Judge Advocate General to certify and detail "commissioned officer[s] of the armed forces" to serve as military trial judges), 827(b) (specifying that prosecution and defense counsel who are detailed to practice before courts-martial must be judge advocates, who are, by definition, commissioned military officers), 870 (providing that the Judge Advocate General shall "detail * * * commissioned officers" to serve as appellate counsel before the Courts of Military Review and the Court of Military Appeals).

[4] See 10 U.S.C. 531(a) ("Original appointments [of Regular Navy and Marine Corps officers] * * * shall be made by the President, by and with the advice and consent of the Senate."), 593

judge may be assigned to nonjudicial duties by the Judge Advocate General, as necessary to meet the needs of the service.

Like their colleagues in the trial judiciary, the judges of the Navy-Marine Corps Court of Military Review are commissioned officers in the Navy and Marine Corps and were appointed (at least originally) by the President, with the advice and consent of the Senate. By statute, Art. 66(a), UCMJ, 10 U.S.C. 866(a), the Judge Advocate General of the Navy selects the judges of that court, which reviews the judgments of the trial courts within the military justice system. As a matter of practice, the Judge Advocate General of the Navy has assigned to the Navy-Marine Corps Court of Military Review only those commissioned officers who are in the Navy Judge Advocate General's Corps and those who are designated by the Marine Corps as "judge advocate[s]" or "law specialist[s]." Congress has recognized this practice by limiting the types of officers who could be "judge advocate[s]." See Art. 1(13), UCMJ, 10 U.S.C. 801(13). Judges on the Navy-Marine Corps Court of Military Review are commissioned military officers, and may be assigned to nonjudicial duties by the Navy Judge Advocate General as he deems necessary to meet the needs of the service.[5]

(requiring Presidential appointment and Senate confirmation of military reserve officers), 624 (governing promotions of regular military officers), 5912 (governing appointments and promotions of reserve officers).

[5] The portion of the governing statute, Art. 66(a), UCMJ, 10 U.S.C. 866(a), that authorizes the Judge Advocate General to assign civilians to serve on courts of military review is not at issue in this case. It is undisputed that no civilian has served on the Navy-Marine Corps Court of Military Review during the consideration of petitioners' appeals. Accordingly, the only question presented in this case is whether the Judge Advocate General of the Navy has in fact assigned judges to the Navy-Marine Corps Court of Military Review who are constitutionally authorized to exercise the duties of that office. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 126, 141 (1976).

ii. Under these circumstances, there is no merit to petitioners' Appointments Clause argument. It is well settled that Congress may modify existing duties or specify additional germane duties to be performed by an officer of the United States without thereby making it necessary for the incumbent again to be nominated, confirmed, and appointed pursuant to the Appointments Clause. See *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893).

In *Shoemaker*, the complainants challenged a statute establishing a commission to oversee the development of Rock Creek Park. 147 U.S. at 284. Three commission members were appointed by the President with the advice and consent of the Senate, but two military officers (the Chief of Engineers of the United States Army and the Engineer Commissioner of the District of Columbia) also were designated to serve on the commission. *Ibid.* Their presence was challenged on the ground that they had not been nominated to and confirmed for their new position. The Court rejected that claim, explaining that, *id.* at 301:

> [T]he two persons whose eligibility is questioned were at the time of the passage of the act * * * officers of the United States who had been theretofore appointed by the President and confirmed by the Senate[.] [W]e do not think that, because additional duties, germane to the offices already held [were added by Congress], it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may

> increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

The Court ultimately held that "the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties." *Ibid.*; see also *Williams* v. *Mercer (In re Certain Complaints Under Investigation)*, 783 F.2d 1488, 1515 (11th Cir.) (holding that members of the Investigating Committee of the Judicial Council of the Eleventh Circuit "were not 'appointed' by the chief judge within the meaning of the Appointments Clause * * * but rather [were] sitting federal judges already appointed by the President * * * [whose] service on [the Investigating Committee was] merely an outgrowth of their existing responsibilities"; citing *Shoemaker* for the proposition that "a statutory expansion of the functions of an existing position does not create a new office requiring re-appointment, at least where the newly-added duties are 'germane' to existing functions"), cert. denied, 477 U.S. 904 (1986).

Under that analysis, the assignment of any Navy or Marine Corps officer to serve a tour of duty as a trial judge is entirely consistent with the Appointments Clause. All military officers are responsible for seeing to the discipline of the members of their command and are trained to enforce the civil and military law. Under the Uniform Code of Military Justice, commissioned officers have a special duty "to quell quarrels, frays, and disorders among persons subject to [the Code] and to apprehend persons subject to [the Code] who take part therein." Art. 7(c), UCMJ, 10 U.S.C. 807(c). Every commanding officer is further authorized to impose certain "non-judicial punishment[s]," including restriction to quarters for no more than 14 consecutive days, instead of instituting court-martial proceedings. Art. 15, UCMJ,

10 U.S.C. 815. Every officer who convenes a general or a special court-martial assumes certain quasi-judicial duties in reviewing the sentences of those courts-martial he convenes. Art. 60, UCMJ, 10 U.S.C. 860. Any commissioned officer may serve as a military trial judge if he possesses the requisite qualifications for performance of that function.[6] Any commissioned officer on active duty is qualified to serve as a member on all courts-martial. Art. 25(a), UCMJ, 10 U.S.C. 825(a). Furthermore, a summary court-martial is composed of one commissioned officer, who need not possess the qualifications of a military judge. Art. 16(3), UCMJ, 10 U.S.C. 816(3).

Thus, not only does the Code anticipate that any qualified commissioned officer may perform the functions of a military judge at some point in his military career, but it also anticipates that any commissioned officer, even an officer lacking the qualifications of a military judge, may at some point be called on to perform judicial functions. The structure of the Code in this respect buttresses the proposition that the duties of a military judge fall within the general duties of an officer in the armed forces. Given the nature of the responsibilities inherent on becoming an officer within the armed services, the duties of a military judge are germane to the duties of a military officer. Petitioners' challenge to the qualifications of the military judges in their cases therefore lacks merit.

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[6] Article 26 of the UCMJ, 10 U.S.C. 826, provides in part that "a military judge shall be detailed to each general court-martial." Although the Navy also has elected to follow the procedures set forth under that provision for special courts-martial, the UCMJ provides that a special court-martial may be composed of either a military judge or a board of at least three members. Art. 16, UCMJ, 10 U.S.C. 816.

2. Petitioners also maintain that the Due Process Clause requires that military judges have a fixed term of office. Petitioners' claim is not materially different from the claim presented by the petitioner in *Graf* v. *United States*, No. 92-1102. We addressed that claim in our brief in opposition in that case, and we rely on that response here.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

THEODORE G. HESS
Colonel, USMC
LAWRENCE W. MUSCHAMP
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Appellate Government Division,
NAMARA

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[7] We have supplied petitioners' counsel with a copy of our brief in opposition in *Graf* v. *United States*, No. 92-1102.